

EXHIBIT C

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NEW YORK IMMIGRATION COALITION, ET AL.,

Plaintiffs,

vs. Case No. 1:18-CF-05025-JMF
UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,
Defendants.

Washington, D.C.

Thursday, August 30, 2018

Deposition of:

EARL COMSTOCK

called for oral examination by counsel for
Plaintiffs, pursuant to notice, at the office of
Arnold & Porter, 601 Massachusetts Avenue NW,
Washington, D.C., before KAREN LYNN JORGENSEN,
RPR, CSR, CCR of Capital Reporting Company,
beginning at 9:08 a.m., when were present on
behalf of the respective parties:

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1 mean to break your line of questioning. Actually,
2 we've been going about an hour and a half. Would
3 now be an appropriate time for a break?

4 MR. COLANGELO: Yes.

5 MR. GARDNER: Let's take a break.

6 VIDEOGRAPHER: This concludes Media Unit
7 Number 1. The time on the video is 10:32 a.m. We
8 are now off the record.

9 (Off the record.)

10 VIDEOGRAPHER: This begins Media Unit
11 Number 2. The time on the video is 10:45 a.m. We
12 are on the record.

13 BY MR. COLANGELO:

14 Q Mr. Comstock, we were talking about the
15 Secretary's June 21, 2018 memo which we marked as
16 Exhibit 5. Do you still have that in front of
17 you?

18 A I do.

19 Q Okay. That memo says that other senior
20 administration officials had previously raised
21 this question. Do you see that line?

22 A Yes.

1 Q Who are those other senior administration
2 officials?

3 A You'd have to ask the Secretary.

4 Q You don't know yourself?

5 A I don't.

6 Q You have no idea which other senior
7 administration officials raised this question,
8 other than the Secretary?

9 A No.

10 Q You never asked him where the idea came
11 from?

12 A Nope.

13 Q He never told you where the idea came
14 from?

15 A Nope.

16 Q You spent a lot of time on this issue?

17 A Not relative to a lot of other things I
18 work on, no.

19 Q How would you characterize the amount of
20 time you spent on this issue?

21 A One one-hundredth of my time.

22 Q You agree that it's an important issue?

1 A Correct.

2 Q It was important to the Secretary?

3 A Correct.

4 Q He was motivated to get this done?

5 A He was working on a lot of different
6 issues at the time.

7 Q But this one was important to him?

8 A Yes. Absolutely.

9 Q Okay. And when you saw the draft of this
10 memo before June 21st and it refers to other
11 senior administration officials, you didn't
12 yourself have any view or understanding of who
13 those other administration officials were?

14 A I did not, no.

15 Q You didn't ask the secretary who those
16 other administration officials were?

17 A No.

18 Q Okay. When recommending that he sign the
19 memo, he didn't say to you who are the other
20 senior -- who the other senior administration
21 officials were?

22 A We did not discuss that, no.

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1 A That's correct.

2 Q Okay.

3 MR. GERSCH: Let's take our short break
4 here.

5 MR. GARDNER: How long?

6 MR. GERSCH: Ten minutes or so.

7 VIDEOGRAPHER: This is the end of Media
8 Unit Number 4. The time on the video is 1:58 p.m.
9 We are off the record.

10 (Off the record.)

11 VIDEOGRAPHER: This begins Media Unit 4.
12 The time on the video is 2:14 p.m. We are on the
13 record.

14 BY MR. GERSCH:

15 Q Mr. Comstock, we're back on the record.
16 Before the break, I was asking some questions
17 about 2018. Now I want to go back to 2017.

18 A Okay.

19 Q You with me?

20 A I'm with you.

21 Q All right. I want to go back to the
22 spring of 2017 when Secretary Ross requests the

1 inclusion of a citizenship question on the census.
2 At that point in time, the Department of Justice
3 had made no request to Commerce for the addition
4 of a citizenship question, correct?

5 A That's correct.

6 Q And they certainly hadn't
7 asked -- withdrawn.

8 The Department of Justice certainly
9 hadn't asked Commerce to add a citizenship
10 question because of the VRA. That's also correct;
11 isn't it?

12 A Well, they didn't ask us to add a
13 citizenship question at that point. So
14 speculating as to why they would ask is
15 irrelevant.

16 Q I'm not asking you to speculate. The one
17 thing we can be sure of is they didn't ask about
18 the VRA is because they didn't ask at all?

19 A Correct.

20 Q All right. And when Secretary Ross says
21 to you in the spring, in whatever words he used,
22 that he wants a citizenship question added to the

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1 census, wouldn't you have had a discussion with
2 him at the time about why he wants that?

3 MR. GARDNER: Objection. Asked and
4 answered.

5 THE WITNESS: Again, the answer is no, I
6 would not have a discussion. My boss, if he asked
7 me to investigate something, I investigate it and
8 report back the results.

9 BY MR. GERSCH:

10 Q Is your testimony you did not have a
11 discussion?

12 A I did not.

13 Q And you're not saying -- well, withdrawn.
14 Wouldn't it be helpful to you in your job
15 to assist the Secretary to have an understanding
16 of why he wanted the citizenship question?

17 MR. GARDNER: Objection. Form.

18 BY MR. GERSCH:

19 Q You can answer.

20 A Again, I didn't have any particular
21 doubts about why a citizenship question would be
22 useful, so, no, it would not have hurt me to ask.

1 Q I'm not asking whether you had doubts.

2 My question to you is a little bit --

3 A I understand your question.

4 Q My question, sir, is: Wouldn't it be
5 helpful to you in your job of assisting the
6 Secretary to have a complete understanding of why
7 the Secretary wants to add a citizenship question?

8 MR. GARDNER: Objection. Form.

9 THE WITNESS: Again, it's not relevant to
10 the question of whether or not he needs -- of
11 whether or not a question should be added, so, no.

12 BY MR. GERSCH:

13 Q Is it your testimony that why he wants a
14 citizenship question to be added is not relevant
15 to whether it should be added? Did I -- did I
16 hear that right?

17 MR. GARDNER: Objection.

18 Mischaracterizes the witness's prior testimony.

19 THE WITNESS: My test- --

20 MR. COLANGELO: That's exactly what he
21 said, Counsel.

22 THE WITNESS: No. My testimony is: The

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1 rationale for why he would want it added is not
2 relevant to my initial inquiry as to whether or
3 not a question can be added.

4 BY MR. GERSCH:

5 Q Yeah. My question was a little
6 different. The question I am trying to get you to
7 focus on is: In your work for the Secretary,
8 wouldn't it be helpful to you to understand as
9 fully as possible why he thinks it's a good idea
10 to add a citizenship question?

11 A And let --

12 MR. GARDNER: Objection. Asked and
13 answered.

14 THE WITNESS: And let me get you to
15 understand my answer, which is, no, it would not
16 make a difference, because I don't need that
17 information to investigate the question.

18 BY MR. GERSCH:

19 Q Anyone ever say anything to you about why
20 the Secretary thought it was a good
21 idea -- withdrawn.

22 Am I right that your testimony is that

1 you've never had a discussion with the Secretary
2 about why he thought it was a good idea to have a
3 citizenship question added?

4 A That's correct. I have not had a
5 conversation with him, no.

6 Q Okay. And did anyone else say anything
7 to you about why the Secretary thought it was a
8 good idea to have a citizenship question added?

9 MR. GARDNER: Objection. Form.

10 THE WITNESS: Again, no.

11 BY MR. GERSCH:

12 Q All right. If I remember correctly, you
13 testified you worked in a bullpen area?

14 A Correct.

15 Q Outside the Secretary's office?

16 A Yes.

17 Q I'm not sure I've got all the people who
18 were there, but Wendy Teramoto was there, right?

19 A Correct.

20 Q James Uthmeier was there?

21 A No.

22 Q I'm sorry.

1 You were there?

2 A Yes.

3 Q Eric Branstad, was he there?

4 A Yes.

5 Q That's three.

6 Izzy Hernandez, that's four. Was he
7 there?

8 A Yes.

9 Q Who was the fifth?

10 A James Rockas.

11 Q And I'm right that there were five?

12 A Correct.

13 Q Okay.

14 A At times.

15 Q So you're all sitting there -- and are --
16 do you work in cubicles, open desks, how does it
17 work?

18 A Wendy Teramoto had a seated desk. I had
19 a standing desk. Izzy had a standing desk with a
20 stool. James had a standing desk with a stool.
21 Eric Branstad had a standing desk with a stool.

22 Q Are there walls? Are there partitions?

1 Are you all in an open space?

2 A I'm facing -- I was facing Wendy. Izzy,
3 who was rarely there, but his desk was next to
4 mine, facing Eric, and then James was on the end.

5 Q And there are no walls, correct?

6 A No walls.

7 Q No partitions?

8 A No partitions.

9 Q Okay. In all the time that you're
10 sitting there and you're all working together, no
11 one says, why does the Secretary want to add a
12 citizenship question -- citizenship question?

13 A That's correct. Because, again, this was
14 one of well over 100 different items we were
15 working on. All of us were working on different
16 things. I'm primarily tasked with policy. James
17 is primarily tasked with press. And so you're
18 dealing with all of these other issues. There's
19 no reason to discuss it.

20 Q I'm not even talking about discussing it.
21 No one mentioned? Did anyone mention it?

22 A Not that I recall.

1 Q No one says the reason the Secretary
2 wants to add a citizenship question is whatever
3 the reason is, no one ever said anything like
4 that?

5 A No.

6 MR. GARDNER: Objection to form.

7 THE WITNESS: Not to my recollection.

8 BY MR. GERSCH:

9 Q Okay. Did you ever have a discussion
10 with people from the Office of General Counsel at
11 Commerce about why the Secretary wanted to add a
12 citizenship question?

13 A No.

14 Q And in your time there, did you never see
15 a document analyzing why it was a good idea for
16 Census to add a citizenship question?

17 A Again, you're -- we have a fundamental
18 disagreement on the premises of your question.
19 Your premise is that somehow a reason needs to be
20 provided. The question before us is the Secretary
21 has the legal authority to add questions to the
22 census. Is there a governmental need? And if

1 there is, then you're off to the races.

2 Q My question was a little different. My
3 question was --

4 A I understand your question.

5 Q Sir, I'll repeat it for you.

6 My question is: In all the time you're
7 there, did you never see a document spelling out
8 the reasons why it would be a good idea to add a
9 citizenship question? Why it would be good from
10 Commerce's perspective?

11 MR. GARDNER: Objection. Form.

12 THE WITNESS: Again, that's not the
13 question. Commerce --

14 BY MR. GERSCH:

15 Q Excuse me, sir. That is my question.
16 Could you answer my question?

17 A Okay. No.

18 Q Not even a scrap of paper, right?

19 A Nope.

20 Q No memoranda, right?

21 A No.

22 Q No emails?

1 A Not that I recall.

2 Q And I just want to be straight on my
3 understanding. I think I got you correctly, but I
4 just want to make sure and test that I'm right.

5 It couldn't possibly assist you in your
6 work, in any way, to know why the Secretary wanted
7 to add a citizenship question? Do I understand
8 that correctly?

9 A It's not relevant to my analysis.

10 Q And so it couldn't possibly help you in
11 any way in your work?

12 A I'm not going to agree with your
13 statement that way, no.

14 Q Well, that's my question -- withdrawn.

15 Well, is there any way in which knowing
16 what the Secretary's reason was for wanting to add
17 a citizenship question, is there any way that
18 could assist you in your work at
19 Department of Commerce?

20 A Assist me on my work at the Department of
21 Commerce, no.

22 Q Is there any way that it could help you

1 help the Secretary add a citizenship question?

2 A If I had found it difficult or
3 challenging, yes. Knowing more about why he
4 wanted it would have been helpful, but I didn't
5 say that there was an issue. It had been asked
6 for hundreds of years, and it had been asked on
7 the ACS. So, clearly, there's a need for it. And
8 so, no, that was not a particularly troublesome
9 aspect of the question I was being asked to look
10 into.

11 Q When you said if I had found it difficult
12 or challenging, what did you mean? What's the it?

13 A If -- if what I had been requested to do
14 seemed to have significant legal obstacles to the
15 ability to do that question or take that action,
16 then I would probably inquire more fully to see if
17 there's an alternative way to address what the
18 Secretary is trying to get to. In this particular
19 case, you have something that has been on the
20 decennial census before that is currently being
21 asked on the ACS. There's clear legal authority
22 for him to add the question. So, frankly, the

1 reasons that he wants to add it doesn't add
2 anything to the analysis. There is a governmental
3 need for this information. That's a question
4 that's already established, so I don't need to
5 inquire further as to what his personal beliefs
6 regarding this question might be.

7 Q What's the governmental need for the
8 question?

9 A Enforcement to the Voting Rights Act,
10 determining how many undocumented citizens there
11 are. You name it, there's a whole bunch of
12 reasons. That's why every government in the world
13 collects this information.

14 Q Well, correct me if I'm wrong, we're
15 talking about at a period in the spring of 2017
16 when the Voting Rights Act hadn't come up, the
17 Department of Justice hadn't made a request for
18 it. What does the Voting Rights Act got to do
19 with it in the spring of 2017?

20 A When you inquire as to what does the
21 Department of Justice use the citizenship data
22 on --

1 Q That wasn't my question. My question
2 is --

3 A I'm answering your --

4 Q -- why is it a good idea, why does the
5 government need it back in the spring of 2017?

6 A Finished with your question?

7 Q That's my question.

8 A The answer is for the same reason they've
9 been collecting it for the last 200-plus years.

10 Q What's the government need in the spring
11 of 2017?

12 A I already answered that question. If
13 they collect the data under the ACS for Voting
14 Rights Act enforcement, that is one of the primary
15 reasons they collect the data.

16 Q Okay. It's on the ACS. What's the
17 need -- governmental need for it to be on the
18 census?

19 MR. GARDNER: Objection. Asked and
20 answered.

21 THE WITNESS: The governmental need is,
22 again, if you're going to get more detailed

1 information, then you need that information.

2 BY MR. GERSCH:

3 Q Who said in the spring of 2017 that the
4 government needed more detailed information?

5 A Again, I'm presented with a request by
6 the Secretary to say, can we add this question to
7 the census? I inquire about that, and I looked at
8 it. One of the reasons you would need it is
9 voting rights. If you're going to do voting
10 allocations on the basis of census allocations,
11 that's the reason it's perfectly sufficient.

12 Q Who said that in the spring of 2017?

13 A That was -- that was determined after
14 taking a quick look at the issue. I don't need
15 more than that to continue to pursue the question.

16 Q Who told you that the government needed,
17 in the spring of 2017, more detailed information
18 about citizenship than was contained in the ACS?

19 A Nobody.

20 Q You came to that decision on your own; is
21 that right?

22 A Correct.

1 Q But you're not a voting rights lawyer,
2 right?

3 A Irrelevant to the question.

4 Q That's not my question. You're not a
5 voting rights lawyer, right?

6 A I've already said that.

7 Q So you decided on your own in the spring
8 of 2017 that it would be a good idea for the
9 government to have more information than was
10 available from the ACS about citizenship to
11 enforce the Voting Rights Act, even though you're
12 not a voting rights lawyer?

13 A I don't agree with that characterization,
14 at all. I decided that there was sufficient
15 information for me to pursue the Secretary's
16 request to consider placing a citizenship question
17 on the decennial census and that there was
18 sufficient potential reason to collect that
19 information to warrant moving forward. If I'd
20 come to an opposite conclusion that there was not
21 sufficient potential reason or that there was some
22 insurmountable legal bar, then I would have

1 reported back to the Secretary, I'm sorry,
2 Mr. Secretary, it does not appear we can
3 accomplish this objective.

4 Q Why did you need to come up with a reason
5 for asking the question, separate and apart from
6 whatever reason the Secretary had in his own head?

7 A Again, my job is to figure out how to
8 carry out what my boss asks me to do. So you go
9 forward and you find a legal rationale. Doesn't
10 matter what his particular personal perspective is
11 on it. It's not -- it's not going to be the basis
12 on which a decision is made.

13 Q That's your understanding, that the way
14 you should do it, is come up with a rationale that
15 has nothing to do with what's in the Secretary's
16 mind as to why he wants it; is that your
17 understanding of how it's supposed to work?

18 A No. Again, you continue to characterize
19 things in a way that you believe may be correct,
20 but not the way I believe to be correct. My job,
21 as a person who has been doing this for 30-plus
22 years for clients and people in the government, is

1 if they would like to accomplish an objective, I
2 see if there's a way to do that. And, again, if
3 it's not legal, you tell them that. If it can't
4 be done, you tell them that. If there's a way to
5 do it, then you help them find the best rationale
6 to do it. That's what a policy person does.

7 And so, again, if I came up with a
8 rationale that the Secretary didn't agree with or
9 didn't support, then he was going to tell me that.
10 I have no doubt about that. But in the meantime,
11 he doesn't -- I don't need to know what his
12 rationale might be, because it may or may not be
13 one that is -- that is something that's going to a
14 legally-valid basis.

15 So, again, he's got -- he's asked, can we
16 put -- can we put a question on? The job of a
17 policy person is go out and find out how you do
18 that. Whether that decision is going to be made
19 ultimately to do it or not, that's up to the
20 decision-maker.

21 Q Are you saying you're better off not
22 knowing what the Secretary's own rationale is for

1 wanting the citizenship question?

2 A The Secretary, as you would point out, is
3 not a voting rights lawyer, so I would not expect
4 him to necessarily come up with a rationale.
5 That's the job of the staff at work.

6 Q You certainly wouldn't expect the
7 Secretary to have come up with the idea that the
8 reason he should want the citizenship question is
9 the Voting Rights Act; you wouldn't expect him to
10 come up that on his own?

11 A I -- he might well. I don't know.

12 Q You have no reason to believe that he
13 did, right?

14 MR. GARDNER: Objection. Calls for
15 speculation.

16 THE WITNESS: I'm not going to speculate
17 about what his rationale was. You'd have to --

18 BY MR. GERSCH:

19 Q Because --

20 A -- ask him.

21 Q -- because you have no idea what his
22 rationale is?

1 A That's correct.

2 Q Counsel asked you about contact you made
3 with the Department of Justice --

4 A Correct.

5 Q -- starting with a Ms. Haney [sic], I
6 believe.

7 Do you recall that?

8 A Yes. I believe her name is Hankey,
9 but --

10 Q Hankey. I apologize.

11 What was the full name? I can get it out
12 if you don't know it offhand.

13 A Mary Blanche, but --

14 Q I'll find it in here.

15 A It's in one of these exhibits, the memo
16 that I wrote. Here.

17 Q Mary Blanche --

18 A Yep.

19 Q -- Hankey; is that right?

20 A Yeah.

21 Q All right. So you went -- you called
22 Mary Blanche Hankey --

1 A Correct.

2 Q -- with regard to adding a citizenship
3 question to the census, right?

4 A Correct.

5 Q And you wanted to see if the
6 Department of Justice would sponsor the question?

7 A Correct.

8 Q And you had a phone call with her, and
9 you had at least a meeting with her, right?

10 A Right.

11 Q So at least two contacts?

12 A Three, when she called me back with
13 somebody else's name.

14 Q Fair enough.

15 Didn't -- didn't Ms. Hankey say, why do
16 you want to have a citizenship question?

17 A No, she didn't.

18 Q Didn't come up, at all?

19 A Nope.

20 Q She referred you to a Mr. McHenry; is
21 that right?

22 A Correct.

1 Q And he's not a voting rights guy, right?

2 A I don't actually know what his background
3 is.

4 Q Well, you went ahead, back and forth with
5 him over about a month; is that right?

6 A I mean, we spoke on the phone probably
7 three or four times, yeah.

8 Q Going from, I think, the period you
9 mentioned was --

10 A Yeah. It was --

11 Q -- early May to early June, roughly?

12 A Approximately a month, yeah.

13 Q And didn't you learn in that time that
14 he's not a voting rights guy?

15 A No.

16 Q Never came up?

17 A We didn't get into great detail on the
18 rationale.

19 Q You did ask him would you sponsor a
20 census question for -- I'm sorry. Withdrawn.

21 You did ask Mr. McHenry if he would be
22 willing to sponsor a request for the addition of a

1 citizenship question on the census, right?

2 A I didn't ask Mr. McHenry if he would. I
3 asked if the Department of Justice would be
4 inclined to send a letter asking us to add the
5 citizenship question.

6 Q Fair enough.

7 And when you did that, you didn't explain
8 to Mr. McHenry why the Secretary wanted a
9 citizenship question?

10 A I would have no reason to.

11 Q And Mr. McHenry never asked, hey, you
12 want me to do this? Why do you need it? He never
13 asked you that?

14 A I think I explained at the outset that
15 the department currently got a report from the ACS
16 on citizenship level -- I mean, on
17 census -- certain census size, Citizen Voting Age
18 Population, and if they were to get it from the
19 decennial, that would allow them a greater
20 granularity and would that be useful to them, and
21 he said he would inquire.

22 Q You asked Mr. McHenry if the

1 Department of Justice would find it useful to have
2 more granularity about citizenship?

3 A Correct.

4 Q But at no point did Mr. McHenry say,
5 look, if we want it, we'll ask for it, but how
6 come you want it? Didn't he ask you something
7 like that?

8 A No.

9 Q When people call you and say, hey, will
10 the Department of Commerce do this or do that,
11 don't you say, why do you want that, why do you
12 need that?

13 A I usually say is there a reason that you
14 think the Department of Commerce would need
15 that -- and if they have a reason, then I'll look
16 into it. I don't say, hey, why does your boss
17 want this? That's not part of lexicon.

18 Q No. No. If another agency calls and
19 says --

20 A I don't --

21 Q Let me finish the question and you can
22 answer any way you want.

1 both the workload I was under and the workload
2 that they're under that I think is misinformed.

3 In fact, several of my calls with
4 Mr. McHenry were made while I was driving into
5 work, so there was no opportunity to call somebody
6 and do that research.

7 And, besides, this wasn't about getting
8 leverage on Mr. McHenry. This was simply to
9 ask -- following up on the person I'd been
10 directed to, who, based on the fact that it was
11 recommended by an assistant to the AG, I'm
12 assuming is going to at least be somewhat
13 receptive. Probably an error on my part, but
14 that's -- I've got a dozen other things I'm
15 dealing with at the same time. So, no, I'm not
16 going to spend a lot of time researching this guy.

17 BY MR. GERSCH:

18 Q You didn't spend any time researching
19 this guy?

20 A Correct. I didn't.

21 Q Secretary Ross certainly knows why he
22 wanted a citizenship question back in the spring

1 of 2017, right?

2 A You'd have to ask him.

3 Q Is there anyone besides Secretary Ross
4 who we could go to who would have that
5 information?

6 MR. GARDNER: Objection. Lack of
7 foundation. Calls for speculation.

8 THE WITNESS: I'm not aware of anybody.

9 BY MR. GERSCH:

10 Q Do you have any reason to believe that
11 Secretary Ross's rationale for wanting to add a
12 citizenship question is some kind of supersecret?

13 A No.

14 Q Doesn't involve national security, right?

15 MR. GARDNER: Objection. Lack of
16 foundation. Calls for speculation.

17 THE WITNESS: I don't know what the
18 Secretary's rationale is. You'd have to ask him.

19 BY MR. GERSCH:

20 Q But you don't think it involves national
21 security?

22 MR. GARDNER: Same objections.

1 Q Let me put a different question to you.

2 A Sure.

3 Q When Representative Norton asks you the
4 why question, don't you think it's responsive to
5 the why question that the Secretary of Commerce
6 wanted to add a citizenship question independent
7 of the Department of Justice's request?

8 A No. I don't think it's relevant. His
9 decisional memo laid out very clearly the
10 rationale that was the basis of his decision.
11 Whatever his personal feelings may have been are
12 irrelevant to that decision.

13 Q It laid out a rationale. We can agree on
14 that, right?

15 A That's what he's required to do under the
16 law, is lay out a rationale. That is the
17 rationale for his decision and that's what he's
18 standing on.

19 Q Okay. He laid out a rationale. Is it
20 your understanding, under the law, that if the
21 rationale is not his real reason for doing it, we
22 should ignore the real reason, and we should only

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1 focus on the pretextual reasons that he offers up?

2 MR. GARDNER: Objection. Calls for a
3 legal conclusion.

4 THE WITNESS: The Secretary's decision
5 memo lays out a valid reason that's consigned to
6 his discretion under the law, and that is the
7 rationale he provided to staff, and that is the
8 rationale that we placed in the record. So that
9 is his reason for having the question.

10 BY MR. GERSCH:

11 Q My question is a little different. If
12 the Secretary's real rationale is something
13 different than the rationale he lays out in his
14 decisional memo, is it your understanding, under
15 the law, that we're to ignore the real reason and
16 only focus on what's in the decisional memorandum?

17 MR. GARDNER: Objection. Calls for a
18 legal decision.

19 THE WITNESS: Your hypothetical is
20 premised on the false conclusion that there is
21 some illegal rationale that would be provided and
22 be exposed and be referenced. There is none.

1 It's committed to his discretion to add a
2 question, as long as you make it through the other
3 things, Paperwork Production Act, et cetera. So
4 it's -- I don't understand the basis for your
5 question. But there's -- at the base of your
6 question is this hypothetical that there's some
7 supposed illegal reason that would be -- that
8 would nullify a perfectly valid decision. I don't
9 agree with that assessment.

10 BY MR. GERSCH:

11 Q Mr. Comstock, I want you to listen to my
12 question carefully, because there was no reference
13 to any illegal rationale, and I'm going to put it
14 to you again and there will be no reference to an
15 illegal rationale. And my only question -- and,
16 by the way, I'm happy if you want to take this as
17 a hypothetical.

18 My only question is: If the Secretary
19 lays out a rationale in his decisional memorandum
20 which is different than his real rationale, is it
21 your understanding that we're supposed to ignore
22 the real rationale and only focus on what's in the

1 decision memo?

2 MR. GARDNER: Given your introductory
3 clause, objection. Calls for a hypothetical.
4 Objection. Calls for a legal conclusion.

5 THE WITNESS: Again, a decision is valid
6 if a valid reason has been spelled out, and that
7 is what we did.

8 BY MR. GERSCH:

9 Q Could you answer my question?

10 A Again, I don't accept the premise of your
11 question, which is that there's some other reason
12 besides what was provided in the memo.

13 Q It's a hypothetical question, sir. The
14 question is --

15 A I'm not going to answer a hypothetical on
16 that basis.

17 Q I'm asking you to answer it, and you're
18 here to answer questions, and I think I'm fairly
19 following up on your testimony.

20 My question to you is real simple: If
21 the Secretary lays out a rationale in his
22 decisional memorandum and it's not his real

1 rationale, is it your understanding that what
2 we're supposed to focus on is what's in the
3 decisional memorandum and we're not supposed to
4 look at the rationale?

5 MR. GARDNER: Objection. Calls for
6 hypothetical. Objection. Calls for legal
7 conclusion.

8 THE WITNESS: Again, we're at loggerheads
9 here because you keep spelling out something that
10 is -- that presupposes there is some other
11 rationale that would be sufficient to outweigh a
12 legitimate rationale and, therefore, must be
13 noticed and taken care of. I mean, the government
14 makes decisions all the time and spells out a
15 rationale. Do some of decision-makers have,
16 perhaps, other reasons, maybe, but it's not
17 relevant to the legal analysis.

18 Q We shouldn't know what Secretary --
19 withdrawn.

20 We shouldn't know what the real rationale
21 is; is that testimony?

22 A I --

1 MR. GARDNER: Objection. Calls for a
2 legal conclusion.

3 THE WITNESS: Again, I have no reason to
4 believe that the rationale is anything other than
5 what's in the memo.

6 BY MR. GERSCH:

7 Q Well, sir, actually, you testified
8 previously that the Secretary had a rationale for
9 asking this question, which he didn't reveal to
10 you and had nothing to do with the
11 Department of Justice's request.

12 A I disagree with that statement.

13 Q Let's try this one other way. You don't
14 disagree with the proposition that a
15 decision-maker could have a rationale that is
16 different than what he chooses to spell out in his
17 decisional memorandum, right?

18 MR. GARDNER: Objection. Calls for
19 hypothetical.

20 THE WITNESS: Again, I don't know -- I
21 don't -- it's impossible to answer that question,
22 because you -- I'm not sure where you're going

1 with it.

2 BY MR. GERSCH:

3 Q I'm not asking you to know where I'm
4 going with it. I'm asking you to answer the
5 question. I'll put it to you again.

6 You don't disagree with the proposition
7 that it's possible for the decision-maker to have
8 one rationale which he puts in the decisional
9 memorandum and a completely different rationale
10 which is the real reason he wants the decision
11 done?

12 MR. GARDNER: Objection. Calls for a
13 hypothetical.

14 THE WITNESS: Again, in the context we're
15 dealing with, I don't agree with that statement.

16 BY MR. GERSCH:

17 Q It's not possible for that to happen,
18 it's not possible for the decision-maker to put
19 one rationale in the decisional memo and have a
20 completely different rationale for why he wants
21 the decision?

22 MR. GARDNER: Objection. Calls for a

1 hypothetical.

2 THE WITNESS: In my experience with the
3 federal government service across 30 years, both
4 Democrat and Republican, I'm not aware of
5 decision-makers who would do such a thing.

6 BY MR. GERSCH:

7 Q This would never happen, in your view,
8 right?

9 A I'm not going to use the word never.
10 Clearly, in the course of human history, things
11 like that do happen. That's not been my
12 experience that it generally is the case.

13 Q That's fine. Put aside your experience.
14 I'm just asking you conceptually, you don't have
15 difficulty understanding that a decision-maker
16 could say I'm doing this for one reason without
17 revealing that he is actually doing it for a
18 different reason. You understand that concept,
19 right?

20 MR. GARDNER: Objection. Calls for a
21 hypothetical.

22 THE WITNESS: Yeah. It's a hypothetical

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1 to which the answer is always going to be yes. So
2 to the extent that makes you happy, sure.

3 BY MR. GERSCH:

4 Q Okay. So you do understand that concept.
5 So when that occurs, when it is the case that the
6 decision-maker puts forth a stated rationale,
7 which is, in fact, not his real rationale, is it
8 your understanding that we should pay no attention
9 to his real rationale and focus only on his stated
10 rationale?

11 MR. GARDNER: Objection. Calls for
12 hypothetical objection. Calls for a legal
13 conclusion.

14 THE WITNESS: I'm not going to answer
15 that question.

16 MR. GARDNER: Would now be a good time
17 for a break? We've been going about an hour.

18 VIDEOGRAPHER: This concludes Media Unit
19 Number 5. The time on the video is 3:11 p.m. We
20 are off to record.

21 (Off the record.)

22 VIDEOGRAPHER: This begins Media Unit